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UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH DAKOTA
 WESTERN DIVISION

| | | |
|--------------------------|---|---------------------|
| ECKART TRUCKING, INC. |) | No. 05- <u>5101</u> |
| |) | |
| Plaintiff, |) | |
| |) | |
| VS |) | |
| |) | |
| C & W ENTERPRISES, INC., |) | |
| |) | COMPLAINT |
| AND |) | |
| |) | |
| NORTH AMERICAN SPECIALTY |) | |
| INSURANCE COMPANY, |) | |
| |) | |
| Defendants. |) | |

COMES NOW the Plaintiff, Eckart Trucking, Inc., and for its causes of action against the Defendants, states and alleges, as follows:

JURISDICTIONAL STATEMENT

1. The matter in controversy is in excess of \$75,000, exclusive of interest and costs, and is between citizens from different States.
2. Plaintiff is a corporation located and incorporated in the State of Montana. Its principal place of business is the State of Montana. Its registered agent is William Eckart, 1415 North 6th Street, PO Box 325, Miles City, MT 59301.
3. Defendant C & W Enterprises, Inc. is a corporation located and incorporated in the State of South Dakota. Its principal place of business is the State of South Dakota. Its registered agent is Warren Barse, 47184 258th Street, PO Box 84826, Sioux Falls, SD 57118.
4. Defendant North American Specialty Insurance Company is a corporation located and incorporated in the State of New Hampshire. Its principal place of business is the State of New Hampshire. Its registered agent is Robert M. Solitro, 650 Elm Street, Manchester, NH 03101.

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GENERAL ALLEGATIONS

5. That the United States government and the Oglala Sioux Tribe, Pine Ridge, South Dakota, entered into contracts for at least two (2) construction/highway improvement projects pertinent to this action. The projects are formally known as the Route 2 Cuny Table Road Project and the Base and Blotter Project. The work is to be performed on the Pine Ridge Indian Reservation in South Dakota.
6. That the Oglala Sioux Tribe acting by and through its Transportation Department entered into a subcontract with Defendant C & W Enterprises, Inc. on October 3, 2002. According thereto, C & W Enterprises, Inc. is to provide labor and material for the Route 2 Cuny Table Project with a value of \$3,234,377.72.
7. That the Oglala Sioux Tribe acting by and through its Transportation Department entered into another subcontract with Defendant C & W Enterprises, Inc. on August 13, 2003. According thereto, C & W Enterprises, Inc. is to provide labor and material for the Base and Blotter Project in the amount of \$1,972,029.28.
8. That each of the subcontracts between the Oglala Sioux Tribe and C & W Enterprises, Inc. required a Subcontract Payment Bond in an amount equivalent to the subcontract amount to secure C & W Enterprises, Inc.'s performance.
9. That C & W Enterprises, Inc. obtained and provided a Subcontract Payment Bond for each of its subcontracts. The bonds are issued by North American Specialty Insurance Company.
10. That each bond names C & W Enterprises, Inc. as the Principal, North American Specialty Insurance Company as the Surety, and the Oglala Sioux Tribe Transportation Department, Pine Ridge, South Dakota, as the Obligee.
11. That Subcontract Payment Bond Number 191584 was issued for the Route 2 Cuny Table Project. The bonded amount is \$3,234,377.72. A copy of the bond is attached hereto as **Exhibit A** and made part herein by this reference.
12. That Subcontract Payment Bond Number 182674 was issued for the Base and Blotter Project. The bonded amount is \$1,972,029.28. A copy of the bond is attached hereto as **Exhibit B** and made part herein by this reference.
13. That Defendant C & W Enterprises, Inc. entered into an subcontract agreement with Plaintiff Eckart Trucking, Inc. on or about August 3, 2005. Pursuant thereto, Eckart Trucking, Inc. agreed to provide labor and gravel/material hauling services at the

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rate of \$110.00 per hour for truck and driver, plus mobilization costs. That Plaintiff began its work for Defendant C & W Enterprises, Inc. on or about August 3, 2005, and completed its final work for Defendant C & W Enterprises, Inc. on or about September 2, 2005.

14. That Plaintiff's work was completed and the last labor and material provided to Defendant C & W Enterprises, Inc. on the Route 2 Cuny Table Project on the 4th day of August, 2005.
15. That Plaintiff's work was completed and the last labor and material provided to C & W Enterprises, Inc. on the Base and Blotter Project on the 2nd day of September, 2005.
16. That Plaintiff completed its work timely and in a proper manner and has provided a summary of charges, as well as detailed invoicing to the Defendant C & W Enterprises, Inc.
17. That work on the Base and Blotter Project has not yet been completed. However, the Oglala Sioux Tribe has paid Defendant C & W Enterprises, Inc. substantial progress payments for its work on the project but none of the funds have been paid to Plaintiff.
18. That the Oglala Sioux Tribal Council has approved a recommendation of its Transportation Department to terminate the right of C & W Enterprises, Inc. to continue work on the Base and Blotter Project.
19. That work on the Route 2 Cuny Table Project has not yet been completed. However, the Oglala Sioux Tribe has paid Defendant C & W Enterprises, Inc. substantial progress payments for its work on the project but none of the funds have been paid to Plaintiff.
20. That Plaintiff verily believes that the Oglala Sioux Tribal Council has or will soon terminate its subcontract with C & W Enterprises, Inc. for the Route 2 Cuny Table Project.
21. That Defendant C & W Enterprises, Inc. agreed to pay the Plaintiff a reasonable mobilization charge to move Plaintiff's equipment and personnel to the projects. The Plaintiff charged the Defendant C & W Enterprises, Inc. \$4,000.00 for mobilization which is a fair and reasonable amount.
22. That Plaintiff's claim for payment by the Surety on the subcontract payment bond is ripe for adjudication for the following reasons: the right of C & W Enterprises, Inc.

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to perform and complete the projects in question has or will be terminated; the prime contractor, the Oglala Sioux Tribe, has paid substantial progress payments to C & W Enterprises, Inc.; and C & W Enterprises, Inc. is unable or unwilling to pay the Plaintiff due to cash flow or other economic concerns.

23. That Plaintiff has incurred attorney's fees, costs, and disbursements associated with the efforts and legal recourse necessary to obtain payment from the Defendants.

COUNT 1 - BREACH OF CONTRACT
ROUTE 2 CUNY TABLE PROJECT

24. That Plaintiff re-alleges all of the allegations contained in paragraphs 1 through 23 above.
25. That Defendant C & W Enterprises, Inc. owes Plaintiff for services provided for the Route 2 Cuny Table Project of \$14,295.00 plus prejudgment interest at the statutory rate of 10% per annum or \$3.91 per day to begin accruing as of September 3, 2005.
26. That an allocation or pro-rata apportionment of mobilization costs attributable to the Route 2 Cuny Table Project is included in the balance due. That the percentage of the mobilization costs attributed to the Cuny Table Project is 4% of \$4,000.00 or \$160.00.
27. That Plaintiff has complied with all provisions of the subcontract agreement between Plaintiff and C & W Enterprises, Inc. for work performed on the Route 2 Cuny Table Project.
28. That demand has been made by Plaintiff to Defendant C & W Enterprises, Inc. for payment but C & W Enterprises, Inc. has neglected, failed or refused to make payment to Plaintiff for the Route 2 Cuny Table Project.
29. That copies of Plaintiff's invoices of work performed on the Route 2 Cuny Table Project in accordance with the subcontract between Plaintiff and Defendant C & W Enterprises, Inc. are attached hereto as **Exhibit C-1 and C2** and made part herein by this reference. (**Exhibit C has been redacted. Charges not applicable to the allegations in this Complaint have been deleted.**)

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COUNT 2 - BREACH OF CONTRACT
BASE AND BLOTTER PROJECT

30. That Plaintiff re-alleges all of the allegations contained in paragraphs 1 through 29 above.
31. That Defendant C & W Enterprises, Inc. owes Plaintiff for services provided for the Base and Blotter Project of \$323,395.00 plus prejudgment interest at the statutory rate of 10% per annum or \$88.60 per day.
32. That an allocation or pro-rata apportionment of mobilization costs attributable to the Route 2 Cuny Table Project is included in the balance due. That the percentage of the mobilization costs attributed to the Base and Blotter Project is 81% of \$4,000.00 or \$3,240.00.
33. That Plaintiff has complied with all provisions of the subcontract agreement between Plaintiff and C & W Enterprises, Inc. for work on the Base and Blotter Project.
34. That demand has been made by Plaintiff to Defendant C & W Enterprises, Inc. for payment but C & W Enterprises, Inc. has neglected, failed or refused to make payment to Plaintiff for the Base and Blotter Project.
35. That copies of Plaintiff's invoices of work performed on the Base and Blotter Project in accordance with the subcontract between Plaintiff and Defendant C & W Enterprises, Inc. are attached hereto as **Exhibit D-1 to D-14** and made part herein by this reference. (**Portions of Exhibit D have been redacted. Charges not applicable to the allegations in this Complaint have been deleted.**)

COUNT 3 - CLAIM ON PAYMENT BOND
ROUTE 2 CUNY TABLE PROJECT

36. That Plaintiff re-alleges all of the allegations contained in paragraphs 1 through 35 above.
37. That Plaintiff gave written notice of its claim against Subcontract Payment Bond Number 191584 by registered mail on the 2nd day of November, 2005, to the Principal, C & W Enterprises, Inc.; to the Surety, North American Specialty Insurance Company; and to the Obligee, Oglala Sioux Tribe Transportation Department, Pine Ridge Indian Reservation.

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38. That Subcontract Payment Bond Number 191584 was issued for an amount sufficient to satisfy the claims of the Plaintiff for the unpaid payment obligation owed to the Plaintiff on the Route 2 Cuny Table Project by the Principal, C & W Enterprises, Inc.
39. That the Subcontract Payment Bond No. 191584 is in full force and effect, and that the Surety, North American Specialty Insurance Company, is obligated to perform on the bond and make payment to Plaintiff on behalf of the Principal.
40. That the Plaintiff has completed a proof of claim form supplied by the Surety for Bond Number 191584 and submitted said proof of claim to Defendant North American Specialty Insurance Company through its agent representative, Sage Associates, on October 6, 2005.
41. That Defendant North American Specialty Insurance Company has neglected, failed, or refused to pay the sum now due from the Principal to the Plaintiff for the Route 2 Cuny Table Project.
42. That Defendants owe Plaintiff \$14,295.00 on Subcontract Payment Bond Number 191584 plus prejudgment interest on this unpaid balance at the statutory rate of 10% per annum or \$3.91 per day to begin accruing as of September 3, 2005.

**COUNT 4 - CLAIM ON PAYMENT BOND
BASE AND BLOTTER PROJECT**

43. Plaintiff re-alleges all of the allegations contained in paragraphs 1 through 42 above.
44. That Plaintiff gave written notice of its claim against Subcontract Payment Bond Number 182674 by registered mail on the 2nd day of November, 2005, to the Principal, C & W Enterprises, Inc.; to the Surety, North American Specialty Insurance Company; and to the Obligee, Oglala Sioux Tribe Transportation Department, Pine Ridge Indian Reservation.
45. That Subcontract Payment Bond Number 182674 was issued for an amount sufficient to satisfy the claims of the Plaintiff for the unpaid payment obligation owed to the Plaintiff on the Base and Blotter Project by the Principal, C & W Enterprises, Inc.
46. That the Subcontract Payment Bond No. 182674 is in full force and effect, and that the Surety, North American Specialty Insurance Company, is obligated to perform on the bond and make payment to Plaintiff on behalf of the Principal.

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47. That the Plaintiff has completed a proof of claim form supplied by the Surety for Bond Number 182674 and submitted said proof of claim to Defendant North American Specialty Insurance Company through its agent representative, Sage Associates, on October 6, 2005.
48. That Defendant North American Specialty Insurance Company has neglected, failed, or refused to pay the sum now due from the Principal to the Plaintiff for the Base and Blotter Project.
49. That Defendants owe Plaintiff \$323,395.00 on Subcontract Bond Number 182674 plus prejudgment interest on this unpaid balance at the statutory rate of 10% per annum or \$88.60 per day to begin accruing as of September 3, 2005.

WHEREFORE, Plaintiff prays for judgment, as follows:

- A. Judgment against Defendant C & W Enterprises, Inc. in the amount of \$337,690.00 (\$14,295.00 for the Route 2 Cuny Table Project and \$323,395.00 for the Base and Blotter Project, Pine Ridge Indian Reservation, Pine Ridge, South Dakota);
- B. Judgment against Defendant North American Specialty Insurance Company for the sum of \$14,295.00 due on Subcontract Bond Number 191584 for the Route 2 Cuny Table Project, Pine Ridge Indian Reservation, Pine Ridge, South Dakota;
- C. Judgment against Defendant North American Specialty Insurance Company for the sum of \$323,395.00 due on Subcontract Bond Number 182674 for the Base and Blotter Project, Pine Ridge Indian Reservation, Pine Ridge, South Dakota);
- D. Prejudgment interest at the statutory rate of 10% or \$92.51 per day to begin accruing as of September 3, 2005;
- E. For Plaintiff's attorney's fees, costs and disbursements in this matter; and
- F. For such other and further relief as the Court might deem just and equitable in the premises.

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Dated this 15th day of November, 2005.


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